IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION, *et al.*,

Appellants,

v.

EDWARD V. REGAN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE YESHIVAH RAMBAM

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OPINIONS BELOW

The opinions of the three-judge district court before and after this Court's remand of the case are reported at 414 F. Supp. 1174 (S.D.N.Y. 1976), and at 461 F. Supp. 1123 (S.D.N.Y. 1978).

QUESTION PRESENTED

Whether a New York statute which authorizes reimbursement of nonpublic schools for the actual costs of administering state-prepared tests and taking student attendance violates the Establishment Clause of the First Amendment.

STATEMENT

Three days after it decided *Wolman v. Walter*, 433 U.S. 229 (1977), this Court vacated and remanded this case to the district court for reconsideration "in light of" *Wolman v. Walter*. Prior to that time, the court below had concluded that New York's 1974 statute authorizing nonpublic schools to be reimbursed for the "actual cost" of administering standardized examinations which were prepared by state officials was unconstitutional under the First Amendment because it had the "primary effect" of aiding "the secretarian school enterprise as a whole," thereby "result[ing] in the direct advancement of religion." 414 F. Supp. at 1179-80.

After remand, the court below examined the New York statute in light of the various aspects of this Court's *Wolman v. Walter* decision. The parties had filed a stipulation that enumerated the kinds of services performed by nonpublic school personnel which were the subject of the reimbursement provision. The following paragraph, describing the services performed with respect to standardized tests administered in the third, sixth, and ninth grades, is illustrative (Appendix, p. 31a):

> 16. Nonpublic-school personnel perform the following services in regard to PEP tests: ordering and receiving of test materials; arranging for space, time, proctors, distribution and collection of test materials; proctoring of tests; arranging for scoring of the exams, either by machine or by hand; and collection, collation and reporting of results to the State Education Department.

On its reexamination of the application of the Establishment Clause to the reimbursement to nonpublic schools for such ministerial functions, a majority of the court below upheld the law. The court stated that all the tests covered by the New York law "are prepared by the State." 461 F. Supp. at 1128. The fact that nonpublic school personnel engage in "the almost entirely mechanical method prescribed for their administration" did not, in the view of the majority, present the danger of "injection or inculcation of religious views or principles" to which the Establishment Clause of the First Amendment is directed. Nor, applying this Court's decisions, did the majority below believe that the Constitution was violated by the fact that reimbursement was made directly to the nonpublic schools. And since the services to be performed by nonpublic school personnel under the New York statute "are discrete and clearly identifiable," 461 F. Supp. at 1131, the majority below found that there was no danger of unconstitutional "entanglement." 461 F. Supp. at 1130.

ARGUMENT

IMPLEMENTATION OF THE NEW YORK STATUTE PRESENTS NONE OF THE DANGERS TO WHICH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT IS DIRECTED

This Court has had many occasions over the past decade to issue guidelines on the meaning and application of the First Amendment to the field of state financial support of various aspects of education provided in nonpublic schools. The famous "three-part test that has emerged from the Court's decisions," *Wolman v. Walter*,

433 U.S. 229, 235-236 (1977), has been applied in a host of situations. The appellant's brief in this Court argues that the last two parts of the three-fold test are violated by the New York statute.

We maintain that this contention is erroneous, and we agree with the district court's rejection of appellant's claims as to each portion of that test. New York's law neither has the impermissible effect of advancing religion nor does it impermissibly "entangle" government officials with the administration of sectarian schools. There is, however, a more general observation that should be made with regard to this record and the challenge made here by the appellants.

The purpose of the Establishment Clause—as this Court observed in the leading case of *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970) — is to prevent what was described in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), as "three main evils": "sponsorship, financial support, and active involvement of the sovereign in religious activity." This case is such a far cry from these "three main evils" that it demonstrates how, over the past decade of litigation, the forest has been lost for the trees. In determining the constitutionality of this New York statute we urge the Court to step back from a wooden application of the "three-part test" as it did in *Wolman v. Walter* and examine whether and how the particular law, as actually administered, could give rise to the evils which the constitutional provisions prevents.

We deal here with standardized tests—the same examinations being given to public and nonpublic school students throughout the State. The tests are totally secular; there is no opportunity for inculcation of religious dogma in their administration. The questions

consist, almost entirely, "of objective inquiries requiring the student to choose between multiple answers, which leave no room for any possible religious indoctrination." 461 F. Supp. at 1128.

What function do the personnel of the sectarian schools perform? They order and store the tests under meticulous security conditions. They arrange for distribution and proctoring of the tests. They carry out the mechanical, but time-consuming, task of grading the tests, recording the scores, and sending those records to state personnel. How does payment for these services present any danger whatever of "sponsorship, financial support, and active involvement of the sovereign in religious activity"? The only activity being sponsored and supported is the taking of wholly secular tests which present no opportunity whatever for religious indoctrination.

In *Wolman v. Walter*, 433 U.S. 229, 238-241 (1977), this Court recognized that not all testing administered in a sectarian school violates the Establishment Clause of the First Amendment. The Court held that the provision of standardized tests authored by state personnel presents no danger under the First Amendment (433 U.S. at 240-241):

> The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*. Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement.

By the same token, the sectarian school's lack of control over the content of New York's standardized tests prevents use of those tests for religious teaching.

Thus the school's role in administering the standardized tests violates no constitutional prohibition under *Wolman*. And the mechanical function of grading the tests—which teachers perform by themselves and without any communication with a school's students—also raises none of the evils at which the Establishment Clause is directed. The teacher's function is, therefore, totally unlike the function performed in *Meek v. Pittinger*, 421 U.S. 349, 370-371 (1975), where there was a substantial "likelihood of inadvertent fostering of religion."

The remaining question is whether, by providing financial reimbursement to sectarian schools for the "actual cost" of this totally secular, nonreligious activity required by state law, the state oversteps the limits set by the Establishment Clause. The majority of the court below correctly concluded that the mere fact that a sectarian school receives money from the state treasury is not, *ipso facto*, grounds for a declaration of unconstitutionality. Were the constitutional rule otherwise, this Court would have had very little difficulty deciding cases such as *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). If a statute does provide for state financial aid directly to a sectarian school, that is, to be sure, one factor to be given weight in assessing the law's constitutionality (403 U.S. at 621-622), but it is clearly not dispositive.

In this case, the subsidy reimburses the school only for activities which are thoroughly secular and which cannot, by any conceivable stretch of the imagination, be converted to religious indoctrination. Hence the financial aspect of the law does not violate the "primary effect" element of the three-part test.

Moreover, the alternative to a cost-reimbursement process would be for New York State to hire and supervise a separate corps of employees to perform the same ministerial and mechanical functions relating to testing and attendance now being performed by personnel of nonpublic schools. The creation of such a separate bureaucracy would be costly and extremely wasteful. It would provide no added protection against the dangers to which the Establishment Clause is aimed.

Nor is this the type of law which threatens "political divisiveness" along religious lines. The New York statute provides full cost reimbursement for specifically defined services. It is not an open-ended appropriation of a portion of a school's costs. Thus, if the constitutionality of the law is sustained, it cannot give rise to "the likelihood of larger and larger demands as costs and populations grow." *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971).

Appellant's only remaining argument is that "administrative entanglement and surveillance" may result from the state's audit and examination of how nonpublic schools compute the reimbursement to which they are entitled (Brief for Appellants, pp. 13-16). In fact, the record-keeping to support a claim for reimbursement is, as the majority below recognized, very simple, and the underlying services are "discrete and clearly identifiable." 461 F. Supp. at 1131. State supervision in this area would be minimal, and it would not, in any event, constitute "active involvement of the sovereign in religious activity" within the meaning of the *Walz* rule. 397 U.S. at 668.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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